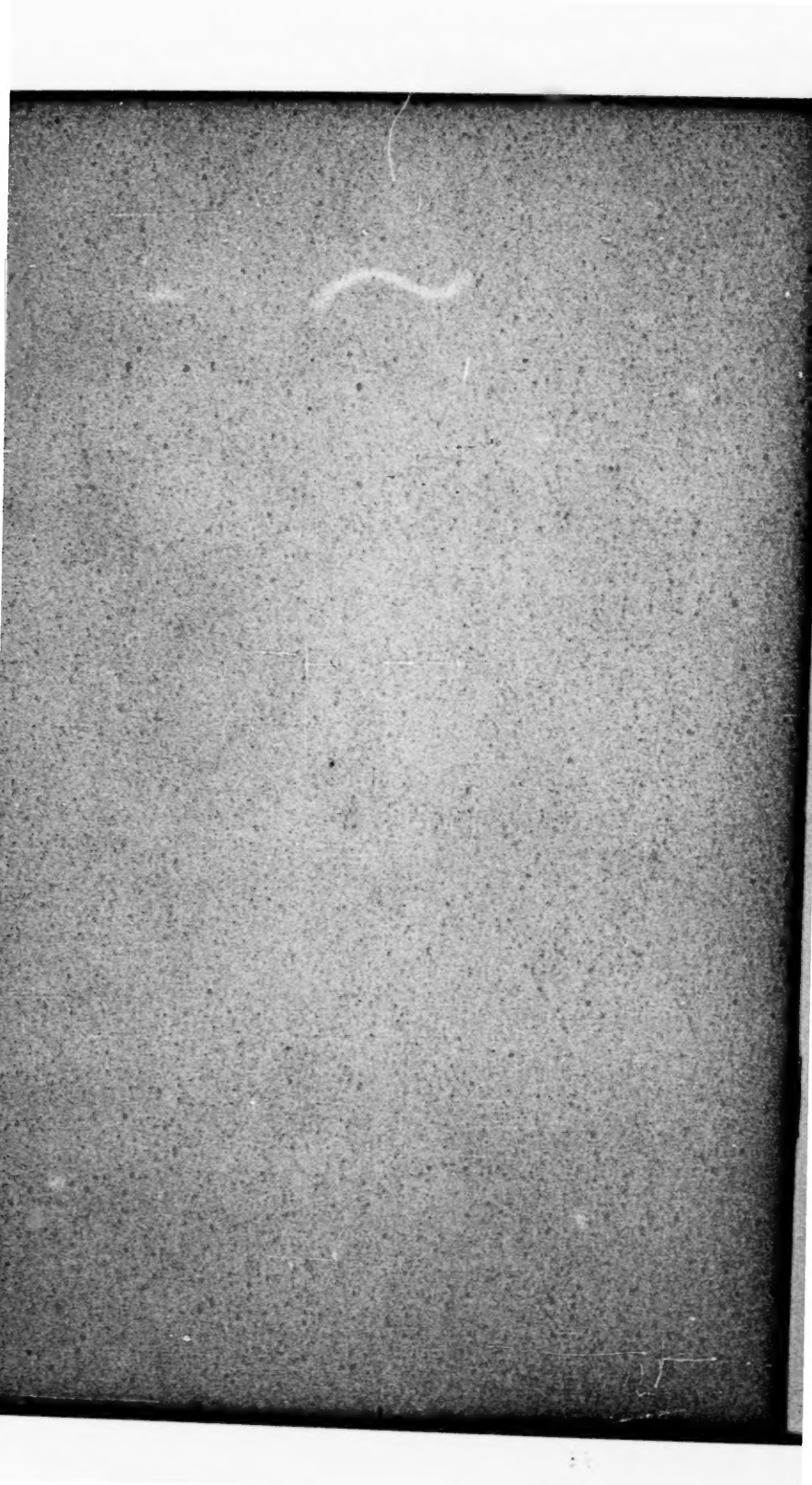

In the Supreme Court of the United States

OCT 2 1974

R., CLERK

OCTOBER TERM, 1974.

No. 74-289.

HALE HOSPITAL, CHARLES F. STUMPF, JOHN C. T. MacNAMARA, JOHN DROSSOS, ELLERY ATWOOD, HOMODE J. HABHAB, MARY FUTRELL, WILLIAM H. GLEED, SHELDON G. MERKER, CLIFFORD A. MILES AND ALFRED E. LAGASSE,

PETITIONERS,

v.

JANE DOE AND REBECCA ROE,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief in Opposition to Petition for a Writ of Certiorari.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief in Opposition to Petition for a Writ of Certiorari.

Counterstatement of Questions Presented.

Whether the Court of Appeals erred in upholding the decision of the District Court enjoining the prohibition of abortions at a public hospital where a substantial por-

tion of the surgery performed at the hospital is similar in nature to abortions and where the hospital had the staff and facilities capable of performing the operation.

Argument.

This case presents no new issues of constitutional law that may be said to have been left unsettled by this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973). *Roe* overturned state laws which prohibited elective abortions, where there were physicians willing and able to perform the operation and women anxious to have it performed. The petitioner Hale Hospital, which is concededly a public institution, seeks to act here precisely as the state acted in *Roe*. It seeks to prohibit all elective abortions when the record undeniably shows it is a hospital specializing in gynecological procedures, with personnel ready, willing and able to perform the procedure, and facilities more than adequate to the task.

In order to depict this case as one falling outside the perimeters of *Roe*, and thus worthy of Supreme Court review, petitioners have had to miscast facts seriously concerning the Hale Hospital's facilities, facts which are established by the explicit admissions of the parties, their pretrial stipulations, and the District Court's findings of fact. Notwithstanding petitioners' characterization, the outcome of this case does not turn on an "analysis of the nature of the . . . duty of health-care facilities . . . to provide [abortions]." (Petition for Writ of Certiorari [hereinafter "Petition"], p. 4.) As the Court of Appeals correctly held, any affirmative obligation of a hospital to provide abortions, while a "cert-worthy" issue, is simply not presented by the case at bar. The record could not be clearer or more complete. Indeed, so certain was the Dis-

trict Court of the applicability of *Roe* that it found the outcome of this case followed "inexorably," like the conclusion of a "syllogism whose major premise [was] *Roe*" and whose minor premise was *Hathaway* v. *Worcester City Hospital*, 475 F. 2d 701 (1st Cir. 1973), where the First Circuit applied *Roe* to a municipal hospital. (Petition, p. 22.) Therefore, we respectfully submit that this case does not warrant Supreme Court review.

1. The opinions of the District Court and of the Court of Appeals are mandated by this Court's decision in *Roe* v. *Wade*, 410 U.S. 113 (1973). *Roe* stands for the proposition that there can be no blanket statutory prohibition of abortions during the first and second trimesters of pregnancy. During the second trimester of pregnancy, a woman's right to terminate her pregnancy can be impinged upon, but only in the form of regulation designed to promote the state's interest in maternal health. *Doe* v. *Bolton*, 410 U.S. 179 (1973), added the admonition that the state may not unduly burden abortion procedures with requirements inapplicable to other surgical procedures. Where a statute prohibits abortions, or sets up burdensome restrictions on them, it is clearly unconstitutional. See, *e.g.*, *Word* v. *Poelker*, 495 F. 2d 1349 (8th Cir. 1974); *Doe* v. *Rampton*, 366 F. Supp. 189 (D. Utah, 1973); *Coe* v. *Gerstein*, 376 F. Supp. 695 (S.D. Fla. 1974).

Nor is there any doubt that a public hospital, and more particularly, a hospital specializing in gynecology, like the petitioner Hale Hospital, may not do what the state is no longer permitted to do. In *Nyberg* v. *City of Virginia*, 495 F. 2d 1342 (8th Cir. 1974), a municipal hospital was compelled to allow its physicians the use of existing facilities and supportive personnel for the performance of abortions. In *Santiago* v. *Colon*, No. 74-862 (D. P.R. August 6, 1974), the District Court of Puerto Rico, citing

to the First Circuit's decision in the instant case, arrived at the identical result. In *Hathaway* v. *Worcester City Hospital*, 475 F. 2d 701 (1st Cir. 1973), which petitioners have not cited, the First Circuit, adding equal protection concerns to the mandate of *Roe*, held that a public hospital may not prohibit sterilization where it offered surgical procedures affecting fundamental privacy interests which involved no greater risk or demand on its facilities. Only private or denominational institutions have escaped the dictates of *Roe*. See *Doe* v. *Bellin Memorial Hospital*, 479 F. 2d 756 (7th Cir. 1973). Where (1) the hospital is public, (2) it has the facilities to perform abortions, (3) it is the only hospital to offer such a procedure within its geographical region, (4) the facilities will not be additionally burdened by their performance, and (5) abortions are nevertheless prohibited, the application of *Roe* is inescapable.

The Hale Hospital qualifies on all counts. It is conceded to be a public hospital. The women who sought abortions in this case are patients of physicians on the staff of the Hale Hospital. In each case, after an examination and consultation with the patient, the physician determined that an abortion would be in the best interests of the woman, and he was ready, willing and able to perform the necessary surgery. Space and operating room time were available at the hospital for the performance of the individual operations. The abortions could not be performed solely because hospital rules and policy prohibit the performance of all abortions unless they have been approved by the hospital's Therapeutic Abortion Committee.[1]

[1] The guidelines governing decisions by the Therapeutic Abortion Committee provide that: (1) the patient must reside in the area generally served by the Hale Hospital; (2) the Committee may consider only those cases in which continued pregnancy would constitute a significant threat to the life or health of the mother—

It is the total prohibition of elective abortions, a policy which is identical to the statutory prohibition found in *Roe,* with which this lawsuit is concerned.[2] No affirmative obligation of the hospital to provide for abortions is at issue in the case at bar. At no time have the respondents asked that the hospital hire additional staff or expand its facilities in order to meet the demand for abortions within its primary service area. Rather, respondents have asked only that the ban on elective abortions be lifted and that abortions be treated like all other elective operations within the hospital.[3] This Court's decision in *Roe* surely requires nothing less.

It is undisputed that the hospital has the capacity to perform abortions. Indeed, shortly after this Court's decision in *Roe,* and prior to the onset of the instant litigation, petitioners made explicit admissions to this effect. Having been asked by the hospital's trustees to specifically evaluate the adequacy of the hospital for the performance of abortions, on February 22, 1972, the executive committee of the hospital's medical staff found that:

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where the threat is based on a physical condition the patient must be examined by a specialist in internal medicine, and where there is a threat to the mental health of the patient, she must have a documented history of mental illness and must be examined by two psychiatrists; (3) the abortion must be approved by a majority of the three-member Therapeutic Abortion Committee.

[2] The Texas statute at issue in *Roe* made it a crime to "procure an abortion" or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." 410 U.S. at 117, 118.

[3] This was precisely the relief ordered by the District Court. The court stated that its order "in no way impinges upon the authority of the hospital Trustees and the Director of the hospital to make hospital facilities available to persons seeking elective abortions only on the same terms and subject to the same conditions as those imposed upon other would-be users of the hospital's facilities." (Petition, p. 25.)

1. adequate medical staff expertise for the performance of elective abortions exists among those staff members with appointment to the Department of Obstetrics and Gynecology, and privileges for the performance of elective abortions should be extended to such staff members;

2. the physical facilities of the Hale Hospital are adequate for the performance of the involved procedures;

3. supportive hospital personnel (nursing, anaesthesia, etc.) have adequate capacities with regard to the procedures involved; and

4. the already existing hospital regulations and practices with regard to operative patients incorporate the guidelines promulgated by the Department of Public Health. (Petition, p. 21.)

A draft abortion policy was recommended and later accepted by the trustees of the hospital. They then voted to defer implementation of the abortion policy pending legal clarification of the proposed guidelines for abortions. Much later, at the behest of the Haverhill city council, and after litigation commenced, they voted to rescind their approval. (Petition, pp. 19-20.)

From the record, it is abundantly clear that the decision to defer implementation of the policy, and later wholly to prohibit abortions, was not based upon considerations of the hospital's inadequacies. At no time prior to the filing of this lawsuit was there any discussion by the trustees or by the medical staff of the hospital's deficiencies. Indeed, the trustees, who were presumptively aware of the hospital's limitations, concurred in the executive committee's finding that the hospital could readily accom-

modate abortion patients when they initially voted to permit abortions.[4]

Nor are those findings unjustified. With the possible exception of a clinic established for the sole purpose of performing abortions, it is difficult to imagine a facility better suited to providing this service than the Hale Hospital. While the hospital provides a wide range of surgical and medical services, the most important area of specialization at the hospital, measured in terms of the number of procedures performed, is obstetrics and gynecology, which accounts for 40 to 45 per cent of the surgery done there. One of the hospital's four operating rooms is reserved for the exclusive use of the Department of Obstetrics and Gynecology. In terms of the complexity of the procedure and the demand on the hospital's staff and facilities, there is little to distinguish an abortion performed during the first three months of pregnancy from other procedures which are routinely performed at the hospital. In fact, the surgical procedure most frequently performed at the hospital is a dilation and curettage—the exact procedure used to terminate a pregnancy during the first three months. (Petition, pp. 20, 21, 22.)

As the District Court found, nothing in the record supports the claim made by the petitioners that the Hale Hos-

[4] *Roe* v. *Wade* was decided on January 22, 1973. On February 22, 1973, the executive committee of the petitioner hospital's medical staff voted to approve the findings described above and a draft abortion policy. The hospital's trustees voted to accept that policy on March 29, 1973. Implementation of the policy was, however, deferred on that date and again on April 9, 1973, in order to clarify several questions concerning the rights of a father and of parents of minors. It was during this period that abortions which had been requested by the plaintiffs' doctors were refused. A total ban on elective abortions was not imposed until June 26, 1973, shortly after this litigation commenced. The elaborate presentation of the hospital's deficiencies occurred only during the trial of this case on July 31, 1973. (Petition, p. 19.)

pital cannot accommodate whatever additional demand on its facilities would result from invalidating the hospital ban on elective abortions. The "occupancy rate" of 95 to 96 per cent cited by the petitioners refers to the availability of bed space in the hospital. And it is the lack of bed space which is the principal reason for the cancellation of scheduled surgical procedures. An abortion performed during the first trimester of pregnancy, however, is usually an outpatient procedure, which in no way requires that the patient occupy bed space in the hospital. An increase in the number of abortions performed at the hospital would not therefore strain the available bed space in any appreciable way. (Petition, pp. 20, 21.) Similarly, while it is true that hospital personnel have the right to refuse to participate in the performance of an abortion for religious or moral reasons, the record is barren of any evidence indicating that the exercise of this right has caused or could cause in the future the "serious personnel scheduling problems" to which the petitioners allude.

Indeed, the petitioners' position on the hospital's resources has been inconsistent. On the one hand, petitioners have recited the overall deficiencies of the hospital and its inability to meet the increased demand on its facilities that the provision of elective abortions would entail. On the other hand, in support of their argument that the right to have an abortion is not significantly impeded by the Hale Hospital's ban, they suggest that the ready availability of abortions in Boston, which is a significant distance from Haverhill, would have the effect of diminishing the demand for abortions at the Hale Hospital. In any event, since the actual demand for abortions at the hospital has been considerably less than was anticipated at the time of trial, there is no reason to believe that the hos-

pital's facilities are not fully adequate to meet that demand.[5]

It is not disputed that the outpatient facilities at the Hale Hospital, like the outpatient facilities at most other hospitals, are sometimes crowded and that this overcrowding occasionally results in inconvenience to patients. However, unless these deficiencies are likely to endanger the lives of pregnant women, the only permissible ground under *Roe* for prohibiting abortion, they are of no constitutional significance. Moreover, whatever the overall shortcomings of the hospital, and there is considerable dispute as to what they are, it is clear that the hospital trustees may not "cure" these deficiencies by singling out for prohibition one kind of procedure from the wide range of gynecological surgery done at the hospital. A finding of limited resources or inconvenience would then provide a consistent excuse for eliminating "socially disfavored" operations, such as abortions. To permit such a tenuous justification for banning abortions would be to overrule *Roe* v. *Wade, sub silentio.*

2. The most astounding proposition put forward by the petitioners is that the hospital's policy is part of a regulatory scheme designed to allocate medical resources. "The purpose and the effect of the regulation . . . is not to prohibit or restrict the performance of abortions but to permit a shift of this extra caseload from a facility which cannot accept it to other facilities within the state which can." (Petition, pp. 6-7.)

[5] Based on the number of births at the hospital, it was estimated that there would be a demand for 300 abortions per year. During the two months following the District Court's decision, only twelve abortions were performed at the Hale Hospital, according to petitioners' doctors, Dr. Baratt and Dr. Kraus.

The record in this case is absolutely devoid of any evidence to support this characterization. The deliberations of the trustees reflect no such concerns. There was no evidence to indicate that the hospital contemplated referral of women seeking abortions to other facilities. No attempt was made to refer the named plaintiffs to other facilities. There is no agreement with any other hospital providing for such referral, nor any indication that other hospitals might be willing and able to accept such cases. In the absence of any evidence showing that the hospital had acted in good faith to assist women in obtaining abortions, the depiction of their action as regulatory is disingenuous, at the very least.[6]

In any event, the trustees of the hospital do not have the authority to "regulate" or "allocate" the facilities of other hospitals. While it might be permissible in certain cases for a governmental body with appropriate regulatory authority to allocate medical resources on a nondiscriminatory basis, it is clear that the trustees of the Hale Hospital, acting unilaterally and in a summary, arbitrary fashion, may not.

There was in fact no rational allocation of medical resources in this case. As the District Court found, no other facilities in the Hale Hospital's "primary service area" are performing elective abortions. (Petition, p. 22.) The decision to ban elective abortions at the Hale Hospital, notwithstanding this fact and the plain adequacy of the hospital's facilities, is not a permissible regulation or allocation of medical resources. It is a clear and unconstitutional prohibition.

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[6] Indeed, at trial, petitioners repeatedly pointed to the absence of any nearby facilities willing and able to perform abortions as a justification for *not* providing abortions. They sought to dramatize the massive demand for abortions that the Hale Hospital would be forced to meet, notwithstanding the limited nature of respondents' requests for relief.

Conclusion.

For the reasons stated, respondents respectfully submit that the Court should deny this petition for a writ of certiorari and affirm the decision of the Court of Appeals and the judgment and order of the District Court.

Respectfully submitted,

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